

United States  
Circuit Court of Appeals  
For the Ninth Circuit

JOSEPH E. WISE and LUCIA J. WISE,  
Appellants,

vs.

CORNELIUS C. WATTS, and DABNEY C. T.  
DAVIS, JR., JAMES E. BOULDIN, JENNIE-  
N. BOULDIN, DAVID W. BOULDIN, and  
HELEN LEE BOULDIN, Appellees,

and

CORNELIUS C. WATTS and DABNEY C. T.  
DAVIS, JR., Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,  
Appelles,

and

JAMES E. BOULDIN, JENNIE N. BOULDIN,  
DAVID W. BOULDIN and HELEN LEE  
BOULDIN, Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,  
Appellees.

and

SANTA CRUZ DEVELOPMENT COMPANY, a  
corporation, Appellant,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS,  
JR., JOSEPH E. WISE, MARGARET W. WISE,  
JENNIE N. BOULDIN, DAVID W. BOULDIN  
and HELEN LEE BOULDIN, Appellees.

Petition for Rehearing **Filed**

OF JOSEPH E. WISE AND LUCIA J. WISE,  
APPELLANTS.

JAN 26 1917

F. D. Monckton,  
Clerk.



United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

JOSEPH E. WISE and LUCIA J. WISE,  
Appellants,

vs.

CORNELIUS C. WATTS, and DABNEY C. T.  
DAVIS, JR., JAMES E. BOULDIN, JENNIE  
N. BOULDIN, DAVID W. BOULDIN, and  
HELEN LEE BOULDIN, Appellees,

and

CORNELIUS C. WATTS and DABNEY C. T.  
DAVIS, JR., Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,  
Appelles,

and

JAMES E. BOULDIN, JENNIE N. BOULDIN,  
DAVID W. BOULDIN and HELEN LEE  
BOULDIN, Appellants,

vs.

JOSEPH E. WISE and MARGARET W. WISE,  
Appellees.

and

SANTA CRUZ DEVELOPMENT COMPANY, a  
corporation, Appellant,

vs.

CORNELIUS C. WATTS, DABNEY C. T. DAVIS,  
JR., JOSEPH E. WISE, MARGARET W. WISE,  
JENNIE N. BOULDIN, DAVID W. BOULDIN  
and HELEN LEE BOULDIN, Appellees.

---

---

**Petition for Rehearing**

OF JOSEPH E. WISE AND LUCIA J. WISE,  
APPELLANTS.

---

---

Now comes Joseph E. Wise and Lucia J. Wise, appellants, and file this their Petition for Rehearing herein, and ask the Court to grant such rehearing, upon the following grounds and for the following reasons, to-wit:

That one of the important questions in this case, duly raised by assignment of error and argued in our briefs, was whether or not a title by adverse possession or prescription, to a definite tract of 160 acres, and a patented millsite of five acres, fenced, occupied and claimed adversely by Joseph E. Wise for more than twenty years prior to the commencement of this action, and a certain definite tract of forty acres, fenced, occupied and claimed adversely by Mary E. Sykes from the year 1900 until her death, and thereafter by her daughter, Lucia J. Wise, both of said tracts being within the limits of the larger tract called Baca Float No. 3, vested in each of said Wises respectively such title under the Statute of Limitations of the State of Arizona, as to defeat the action of plaintiffs, Watts and Davis, and the Bouldins, so far as these three tracts of land are concerned.

If title by adverse possession to a specific small and definite piece of land, within the limits of Baca Float No. 3, can be obtained by anyone, by reason of the Statute of Limitations of Arizona, applying to Baca Float No. 3, as it does to all other private lands in the state, then, under the undisputed facts in evidence in this case, Joseph E. Wise has a valid title by prescription or adverse possession, to the 160-acre tract described in his answer, and to the 5-acre patented millsite; and Lucia J. Wise has a valid title by prescription or adverse possession, to the 40-acre tract described in her answer, and the decision of this Honorable Court, to that extent, should be modified.

This Court, in its decision in this case, has not considered at all this vital question. And without considering this question, in the opinion written by the Court, (an opinion which we, although defeated, recognize as most able and thorough as to the questions which **are** treated therein) this Court renders its decree, the effect of which is to adjudicate that Joseph E. Wise has no title by adverse possession to this 160-acre tract and 5-acre millsite, and that Lucia J. Wise has no title by adverse possession to the 40-acre tract inherited from her mother, Mary E. Sykes.

The importance of this question, and the urgent necessity for its determination by the Court in the present appeal, will be more manifest when we state to the Court that Watts and Davis and the Bouldins, as the owners of Baca Float No. 3, have recently filed with the United States District Court of Arizona, their suits in ejectment, to recover from Joseph E. Wise the possession of the 160-acre tract and 5-acre millsite occupied by him, and to recover possession from Lucia J. Wise of the 40-acre tract occupied by her.

The only defense to these suits in ejectment is the defense of adverse possession, for such a period of time as to ripen into a title. This defense cannot be made by the Wises in the ejectment suits, because the decree of this Court in the present case, is *res adjudicata* upon that defense, as well as any other defense that either of the Wises could have made.

In the ejectment suits just mentioned are numerous other defendants who are not parties in any way to the present case on appeal. The decree of the Court in the case at bar in no way is *res adjudicata* as to them. They can and will each assert, as to the particular tracts occupied by each, title by adverse pos-

session and prescription; their only defense and only title is the Statute of Limitations of Arizona.

If this Court does not, in the present case on appeal, pass upon or decide the question as to whether or not the Statute of Limitations is a good defense, as against the owners of Baca Float No. 3, then that question, as a matter of law, is left open, and this Court may hereafter, upon writ of error in the ejectment suits, decide that the Statute of Limitations is a good defense, and that title by adverse possession can be obtained as against the owners of the Baca Float No. 3. This will give title to all the defendants in the ejectment suits who prove such adverse possession—all but Joseph E. Wise and Lucia J. Wise, who are barred and estopped from making such defense by virtue of the decree in the present case.

And in the present case, wherein this decree is rendered against them, this Honorable Court has not even considered that defense.

Although the 160-acre tract so claimed by adverse possession by Joseph E. Wise is very small compared to the entire area of the Baca Float No. 3, nevertheless, it is a valuable piece of land; Wise has occupied it and lived upon it and claimed it since 1889; he has built his home upon it; he has spent thousands of dollars upon it; he has raised his family upon it, and this piece of land is now worth, with the improvements, many thousands of dollars; far in excess of the sum of \$10,000.

Again, the 40-acre tract claimed by Lucia J. Wise, as heir and executor of her mother, Mary E. Sykes, although small in comparison to the nearly 100,000 acres of the entire tract, nevertheless, is very valuable. There is a two-story brick dwelling upon it, which alone cost more than \$30,000; there are other build-

ings and improvements and this property was occupied and was the home of Mary E. Sykes for more than ten years prior to her death in 1912, and since then has been occupied, claimed and possessed by her heir, executrix and daughter, Lucia J. Wise. The only title claimed to this piece of land is by virtue of adverse possession, and adverse possession only.

As this is a suit brought by the plaintiffs, Watts and Davis, to quiet their title to the Baca Float, as against Joseph E. Wise, owner of the 160-acre tract mentioned, and against Lucia J. Wise, owner individually and as executrix of the 40-acre tract mentioned, the decree in this case, quieting the title of plaintiffs and the Bouldins in effect adjudicates that neither of the Wises has any title to these two tracts of land.

But this Court has not considered the question upon which such a decision must be based, namely, whether or not a title by adverse possession can be obtained against the owners of Baca Float No. 3.

The description of said 160-acre tract and said 40-acre tract, in accordance with the public surveys, that is by quarter section, township and range, is accurate and definite, for long prior to 1899 the government extended the public surveys over the tract described in the 1863 location, as will be seen by reference to the official map of Pima County, in evidence in the case, as well as other maps; and that these two tracts are within the exterior lines of Baca Float No. 3, according to the Contzen survey thereof, is conceded by all the parties to this action; as well as the fact that the description thereof, according to the public surveys is definite and certain.

For the convenience of the Court we will briefly refer to the record on appeal herein to show that in the pleadings, the evidence taken upon the trial, the

rulings of the Court thereon, and our exceptions thereto and in our assignments of error, also in our brief, this defense, as to those specific tracts of land, has been urged in every way upon the attention of the Court, and we, therefore, are entitled to a decision thereon.

**Allegation of title to the 160-acre tract and 40-acre tract by adverse possession is alleged as matter of defense in the answer filed by Joseph E. Wise and Lucia J. Wise.**

In paragraph 36 of the answer of the Wises in this case, the defense of title by adverse possession of Joseph E. Wise to certain tracts is alleged as follows:

“The defendant, Joseph E. Wise, further avers that for eighteen years prior to his obtaining his deeds from the said Wilbur H. King and Mrs. A. M. Ireland, and at the time that he obtained the first of said deeds, he had been continuously, to-wit, from the year 1889 down to the time he obtained the first of said deeds, in peaceable and adverse possession of the following tracts of land, situate within the limits of the said Baca Float No. 3, according to the valid location thereof, to-wit: The east half ( $\frac{1}{2}$ ) of the northwest one-fourth ( $\frac{1}{4}$ ) and the west half ( $\frac{1}{2}$ ) of the northeast one-fourth ( $\frac{1}{4}$ ) and the west half ( $\frac{1}{2}$ ) of the northwest one-fourth ( $\frac{1}{4}$ ) of section 35, township 22 S., of Range 13 E., G. & S. R. B. & M., and containing 340 acres; also Sec. 36 in the said township 22 S. of R. 13 E., containing 640 acres, cultivating, using and enjoying the same during all of said times; and at the time that he obtained his said deeds from said Ireland and King, aforesaid, he claimed to be the owner of said lands and premises aforesaid, under and by virtue of his adverse possession; and that said adverse possession had ripened into a title under the statute of limitations of the then Territory, now State of



Arizona, at the time he acquired his said deeds from said Ireland and King, and that ever since said date he has claimed and does now claim to be the sole owner of all of the said tracts of land, herein just above described; and he further avers that plaintiff's action or cause of action for the tracts of land aforesaid, is barred by the statute of limitations."

Transcript of Record, pp. 77-78.

And the defense of Lucia J. Wise as to her title by adverse possession of the 40-acre tract above mentioned, is thus set forth in said answer, to-wit:

"And the defendant Lucia J. Wise does allege that she is a daughter of Mary E. Sykes; that said Mary E. Sykes died on or about the 11th day of May, 1911; that the said Mary E. Sykes, at the date of her death, was in possession and for a continuous period of more than 10 years prior to her death, had been in the peaceable and adverse possession of the following tract of land, situate within the limits of the said Baca Float No. 3, and within the limits of the lands claimed by plaintiffs, to-wit: The northwest quarter ( $\frac{1}{4}$ ) of section one (1), township twenty-three (23) south, of range thirteen (13) east, Gila and Salt River Base and Meridian, cultivating, using and enjoying the same; and that this defendant, Lucia J. Wise, as one of the heirs of the said Mary E. Sykes, and as executrix of the will of the said Mary E. Sykes, and as successor in interest to the said Mary E. Sykes, ever since the death of the said Mary E. Sykes as aforesaid, has been in the peaceable and adverse possession of the said tract of land just above described, cultivating, using and enjoying the same; and that the plaintiff's cause of action as against the defendant Lucia J. Wise as to the said tract of land just described is barred by the Statute of Limitations of the State of Arizona, and is barred by the provisions of

section 698 of the Revised Statutes of Arizona of 1913.”

Transcript of Record, pp. 78-79.

And in the prayer of said answer the said Joseph E. Wise prays that he be decreed to be the owner of his specific tracts, and Lucia J. Wise prays that she be decreed to be the owner of her specific tract, the prayer of the answer in this regard being as follows:

“3. That the defendant Joseph E. Wise be decreed to be the owner of all the following pieces of land situate within the limits of said Baca Float No. 3 aforesaid, to-wit: The east half of the northwest quarter, the west half of the northeast quarter, and the west half of the northwest quarter of section thirty-five and all of section thirty-six in township twenty-two south of Range 13 East, G. & S. R. B. & M., and that his title thereto be quieted.

“4. That the defendant Lucia J. Wise be decreed to be the owner of all of the following tract of land situate within the limits of said Baca Float No. 3, to-wit: The northwest quarter of the northwest quarter of section one, township 23, south, of Range 13 East, G. & S. R. B. & M.”

Transcript of Record, p. 80.

Evidence was introduced by the Wises upon the trial of this case, sustaining the allegations of the answer as to the 160-acre tract and the 40-acre tract above described.

Upon the trial of this case before the court below, Joseph E. Wise, as a witness, testified that he took possession of and fenced up the said east half of the northwest  $\frac{1}{4}$  and the west  $\frac{1}{2}$  of the northeast  $\frac{1}{4}$  and the west  $\frac{1}{2}$  of the northwest  $\frac{1}{4}$ , sec. 35, township 22 S., of Range 13 East, aforesaid, in 1889, and has been in possession of it since that time, claiming, cultivat-

ing it and occupying it, and he also testified that he had a patent for a millsite containing five acres, called the Magee millsite, and that he had been in possession of that particular five acres, the same being enclosed with a fence, since 1890. (Tr., pp. 385-387.)

It was stipulated upon the trial that Mrs. Mary E. Sykes, mother of defendant Lucia J. Wise, had been in possession continuously from the year 1900 to her death, in 1912, and that Lucia J. Wise, her daughter, as her executrix and heir, was in possession thereafter of the 40-acre tract heretofore mentioned, using, occupying and claiming the same adversely. (Tr., pp. 387-388.)

Plaintiffs Watts and Davis moved the court to strike out this testimony of the Wises, on the ground that it was immaterial in this, that a title by adverse possession could not be acquired against the government, and the lands in question were government lands until 1914, when segregated from the public domain by the filing of the Contzen survey.

This motion was granted by the court, to which ruling Joseph E. Wise and Lucia J. Wise duly excepted. (Tr., pp. 432-433.)

The Wises moved the court that the testimony be considered as taken under Equity Rule 46, and the court ordered that it be so considered. (Tr. pp. 432-433.) Therefore, the evidence is before this Court on the present appeal.

In the decree rendered by the lower court, that court adjudged and decreed amongst other things as follows:

“6th. That until the said tract or parcel of land was segregated from the public domain of the United States on or about December 19, 1914, no adverse possession or statutory prescription

could commence or be initiated by any party to this action.”

In the assignment of errors of appellants Joseph E. Wise and Lucia J. Wise the foregoing rulings of the court are assigned as error, being Assignments of Error IX and X, Transcript of Record, pages 559-562.

Said appellants also assigned as error the above quoted portion of said decree, being their Assignment of Error XX, Tr., p. 569.

These errors are also specified and assigned, as errors relied upon, in the main brief of Joseph E. Wise and Lucia J. Wise, being Specifications IX and X, pages 41-42 of said brief, and Specification of Error XX, on page 44 of said brief.

It therefore will be seen that the question is squarely presented in this case as to whether or not title by adverse possession can be acquired against the owners of Baca Float No. 3. And that question depends on whether or not the statute of limitations commenced to run against these owners from the date when title was vested in the heirs of Baca by the approval by the Surveyor General of the United States of the location made in 1864; or whether the statute will commence to run only from the time the Contzen survey was filed in the office of the Secretary of the Interior, to-wit, December, 1914.

As stated in our brief, heretofore filed herein, if the Statute of Limitations commenced to run from the time that the title vested in the heirs of Baca, to-wit, upon the approval of the location by the Surveyor General in 1864, then a good title by adverse possession could be obtained against those heirs and their grantees, by Wise or others, and the evidence introduced was material and should not have been stricken out; on the other hand, if the statute did not begin to

run until the filing of the Contzen survey in 1914, then, of course, as the ten years required for obtaining title by adverse possession only could not have run, the evidence referred to was immaterial.

The entire solution depends upon the one question: **When** does the Statute of Limitations of Arizona commence to run against the owners of Baca Float No. 3 and in favor of one in peaceable and adverse possession of a specific part of land within said tract.

The statute of Arizona on the subject of adverse possession, where such adverse possession is not under color of title or under a recorded deed, but is by virtue of possession only, is quoted on page 218 of our first brief, but for the convenience of the Court we will quote the same again. It is as follows:

“Any person who has the right of action for recovery of any lands, tenements or hereditaments against another, having peaceable and adverse possession thereof, cultivating, using and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward.”

§2938 Rev. Stats. of Arizona, 1901; also §698 Rev. Stats. of Arizona, 1913.

“The peaceable and adverse possession contemplated in the preceding section as against the person having right of action shall be construed to embrace not more than 160 acres, including the improvements, or the number of acres actually inclosed, should the same be less than 160 acres \* \* \* ”

§2939 Rev. Stats. of Ariz. (1901); §699 Rev. Stats. of Ariz. (1913).

As Wise had had adverse possession of his 160-acre tract for more than ten years prior to 1907, when he obtained his deed from King and Ireland, and more

than ten years prior to the commencement of this suit, and as Lucia J. Wise had had adverse possession of her 40-acre tract for more than ten years prior to the commencement of this suit, each had a good title under the foregoing Statute of Limitations, provided the statute ran from the date when the title to this Baca Float No. 3 was vested in the heirs, namely, in 1864.

The Supreme Court of the United States has held in regard to Congressional grants of land to railroads, that, until the selection and map thereof is approved by the Land Department, the land is not segregated from the public domain, but is part of the public domain, and therefore, is not subject to taxation. (See cases cited page 219 of our first brief.)

But the Act of Congress granting the tract of land in this case is different from the acts granting lands to railroads. The Act in this case simply requires the heirs of Baca to make the location, and the Surveyor General to approve the location as made. Upon that approval the title to the lands vests absolutely in the heirs and the lands no longer belong to the United States.

Therefore, from the date of the approval by the Surveyor General, the lands become subject to taxation, and the heirs of Baca, grantees of the government, or anyone owning under them, had right to bring ejectment or other action to quiet their title, or to obtain possession thereof, or of any part thereof, held or claimed adversely to them.

This Honorable Court in its decision rendered in the present case, quotes the opinion of the Supreme Court of the United States, wherein that court said, in denying leave to file an application for a rehearing, when the question of title was before it, the following:

“The opinion is explicit as to the main elements of decision. It decides that the title to the lands involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in 1864 in pursuance of the Act of June 21, 1860, c. 167, 12 Stat. 71, 72. \* \* \* A few words of explanation will make certain the extent of our decision. In adjustment of the conflict between the Baca grant and the grant to the town of Las

Vegas, the act of 1860 was passed. The land was to be located in square bodies and be ‘vacant land, not mineral, in the Territory of New Mexico,’ and it was made the duty of the Surveyor General of New Mexico to survey and locate the lands when selected by the heirs of Baca. There were no other conditions, and these were fulfilled in 1864.”

Again, this Court in its decision in the present case, as we understand it, finds and holds that the absolute title to the lands in question passed and became vested in the heirs of Baca in 1864, when the Surveyor General approved the location they had made. On this point this Court says:

“The title to the specific tract embraced by the location made on behalf of the heirs June 17, 1863, and approved by the Commissioner of the General Land Office April 9, 1864, had passed to the heirs, and there was, therefore, no authority in any officer of the Land Department to make or permit to be made any change in the location or boundaries of what had theretofore been Baca Float No. 3. Such being the express decision of the Supreme Court in the case of *Lane v. Watts*, above cited, it is needless to comment any further upon that question.

In so deciding the Court evidently proceeded upon the view that the specific description con-

tained in the application of June 17, 1863, identified the land applied for, and that the approval of that selection by the Commissioner of the General Land Office attached the title granted by Congress to that specific tract, and that no patent was required."

If, then, the location so made by the heirs of Baca in 1864, defined a specific tract, the title to which absolutely passed to them in 1864, they had the right to bring suits in the court to recover the possession thereof, by action in ejectment against any adverse claimant, and also had right to bring suit to quiet title against any such adverse claimant. And there is no reason why the Statute of Limitations should not bar the right, if such suit or action was not brought within the time required by the Statute of Limitations.

Under the statute in force in Arizona from 1881 down to the present time, any claimant to land had right to bring suit to quiet title, whether he was **in** or **out** of possession; and the Supreme Court of the United States in construing the statute of Arizona, in force from 1881 and thereafter, has so specifically held, in the case of *Ely v. The New Mexico and Arizona Railroad Company*, 129 U. S., 291-294. The syllabus of that case is as follows:

"By the Act of the Territory of 1881, Chap. 59, any person owning real property, whether in possession or not, in which any other person claims an adverse title or interest, may bring an action against him to determine the adverse claim and to quiet the plaintiff's title."

*Ely v. New Mexico and Arizona Railroad Company*, 129 U. S. 291.

In the revision of the Arizona statutes of 1901 the



foregoing provisions are continued in force, that statute being as follows:

“4104. (Section 1). An action to determine and quiet title to real property may be brought by any one having or claiming, an interest therein, whether in or out of possession of the same, against any person or corporation, or the Territory of Arizona, when such person, corporation or territory claims any estate or interest, adverse to the party bringing the suit, in or to the real estate, the title to which is to be determined or quieted by the action brought: **Provided, however,** That whenever the Territory of Arizona is made defendant in any such action, a copy of the summons and complaint shall be served upon the secretary of the territory and upon the attorney general of the territory; and it shall be the duty of the attorney general to appear and defend the interests of the territory involved in such action or actions.”

Rev. Stats. of Ariz. (1901), pages 1032-1033.

And this same Act is continued in the revision of 1913, as Sec. 1623, Revised Statutes of Arizona of 1913, which is as follows:

“1623. An action to determine and quiet the title to real property may be brought by anyone having or claiming an interest therein, whether in or out of possession of the same, against any person or corporation or the State of Arizona, when such person, corporation or state claims any estate or interest, adverse to the party bringing the suit, in or to the real estate, the title to which is to be determined or quieted by the action brought. When the State of Arizona is made defendant in any such action, a copy of the summons and complaint shall be served upon the attorney general of the state, and it shall be his

duty to appear and defend the interests of the state involved in such action or actions.”

Rev. Stats. of Ariz. (1913), pp. 580-581.

Therefore, since 1881 the heirs of Baca, and all those claiming under them, including Watts and Davis, plaintiffs in this action, had a right to bring suit to quiet title against any person in possession of any portion of said tract of land, who claimed the same adversely; and amongst the persons so in possession and claiming the specific tracts thereof adversely, whom they could have sued, were defendant Joseph E. Wise and defendant Lucia J. Wise, or her mother, Mary E. Sykes, her predecessor in interest.

Therefore, we submit, that a good title by adverse possession under the laws of the Territory and State of Arizona, could be obtained by anyone who had been in such adverse and peaceful possession for the length of time prescribed by the Arizona statute; to-wit, ten years, and that said statute did begin to run from the date that the Surveyor General approved the location of the Baca heirs, to-wit, the year 1864.

Or, if for any reason, it should be held that the action of the Interior Department in recognizing the 1866 location would excuse the heirs of Baca, or their grantees, from bringing such a suit, then, as the Interior Department, in its decision of 1899, held that the heirs of Baca were confined and bound to the location of 1863, at least from that date, to-wit, 1899, the Statute of Limitations would begin to run against the heirs of Baca and their grantees, including plaintiffs Watts and Davis and the Bouldins.

And if such is the law, then under the evidence of Joseph E. Wise and Lucia J. Wise, in this case, taken under Equity Rule 46, heretofore referred to, and set forth in the record, Joseph E. Wise has good title by

adverse possession to his 160-acre tract and millsite, and Lucia J. Wise has good title by adverse possession to her 40-acre tract.

It is a fact, admitted and testified to by Joseph E. Wise, that at one time he filed a homestead under the United States homestead law, on his 160-acre tract, and Mary E. Sykes also filed a homestead upon her tract. This was done upon the theory that the lands were public lands.

However, this Honorable Court has already held, in the case of *Eastern Oregon Land Co. v. Brosnan*, 97 C. C. A. 382; 173 Fed. 67 (cited in our first brief):

“The general rule is well settled that adverse possession of land, though held in admitted subordination to the title of the government, may nevertheless be adverse to everyone else.”

We, therefore, respectfully move this Court for a rehearing of this cause, so that this question, as set forth in Assignment of Errors IX, X and XX, of Joseph E. Wise and Lucia J. Wise, wherein the foregoing specific questions relative to Statute of Limitations are raised, can and will be fully considered by this Court; and that upon such consideration this Court do modify its judgment and decree herein, by decreeing the said Joseph E. Wise to be the owner of said 160-acre tract and the said 5-acre millsite, and Lucia J. Wise to be the owner of said 40-acre tract, aforesaid, or such other decree as may be meet and proper in the premises.



Counsel and Solicitor for Appellants  
Joseph E. Wise and Lucia J. Wise.

STATE OF ARIZONA }  
County of Pima } ss.

I, the undersigned, Selim M. Franklin, counsel for appellants, Joseph E. Wise and Lucia J. Wise, in the foregoing and above-entitled cause, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.



Counsel and Solicitor for Appellants  
Joseph E. Wise and Lucia J. Wise.

Dated January —, 1917.